No. 14-915

NOV 13 2015

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF SCHOOL DISTRICTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are school districts from communities in California and across the country.

In California, Alameda Unified School District employs over 1,400 people to educate over 10,000 students. Chula Vista Elementary School District employs over 2,600 people to educate over 29,000 students. Rincon Valley Union School District employs over 370 people to educate over 3,500 students. San Diego Unified School District employs over 13,500 people to educate over 130,000 students. San Jose Unified School District employs over 3,000 people to educate over 32,000 students. Sweetwater Union High School District employs over 4,100 people to educate over 42,000 high-school aged students and 10,900 adult learners.

In Maryland, Montgomery County Public Schools employs over 22,000 people to educate over 156,000 students. In Connecticut, Meriden Public Schools employs 1,100 people to educate over 9,100 students; New Haven Public Schools employs over 4,000 people to educate over 20,000 students. In Illinois, Collinsville Community Unit School District 10 employs over 700 people to educate over 6,400 students; Decatur Public School District 61 employs over 1,900 people to educate over 9,100 students; Marquardt School District 15 employs over 200 people to educate over 2,700 students; Round Lake Area School District 116 employs over 900 people to educate over 7,200 students. In Minnesota,

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

Fairmont Area Schools employs over 200 people to educate over 1,700 students.

All told, amici collectively employ more than 55,000 personnel responsible for educating more than 460,000 students.

Amici face common challenges that affect school districts throughout the United States, as well as unique circumstances in the varied communities that they serve. Amici share an interest in providing high-quality public education to every student. Amici also share the belief that collaboration and close relationships between administrators, teachers, staff, parents, students, and communities are vital to the success of public education. A collaborative approach reinforces that every staff member is invested in the success of students and the educational mission of the district, from the bus driver whom students first see in the morning to the coaches who lead practices after school.

Amici also have firsthand experience bargaining and collaborating with unions. Through that experience, amici have concluded that stable unions are indispensable partners in improving the quality of public education.

Amici submit this brief to explain why state and local governments have compelling interests in preserving their ability to adopt agency fee arrangements, whether as a matter of state law or as a subject of bargaining. Those interests extend beyond ensuring the existence of an exclusive representative for collective bargaining—though that interest is vital. Amici's experiences show that agency fee arrangements are also essential to effective collective bargaining, close working relationships, and innovative labor-management collaboration—all of which improve public education.

Additionally, amici are gravely concerned that overturning *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), will upset collective-bargaining arrangements and invite discord into public schools. The fallout would be felt not only by amici and their employees, but also by the children they work together to educate.

SUMMARY OF THE ARGUMENT

In the face of many challenges, American public schools must innovate boldly if they are to provide students the best possible education. States and school districts have thus long had the ability to organize their labor relations in the manner they judge most effective for their communities.

Petitioners seek to limit that ability. They claim that school districts' "only" relevant interest is "in negotiating with a single exclusive representative" and that an agency fee arrangement furthers that interest "only" if it prevents a union bankruptcy. Pet. Br. 30, 49. But schools have much more at stake.

Amici and other school districts have concluded that agency fee arrangements facilitate more effective collective bargaining. They create financial security that make it less likely that a union's concerns for its own solvency will inhibit it from agreeing to unpopular concessions to advance the long-term interests of employees, schools, and students. Without agency fee arrangements, unions have an incentive to take hardline positions and pick battles to constantly prove their mettle to their members. In these circumstances, unions face greater pressure to respond to the loudest, most strident voices within their membership, even if those voices do not represent the long-term interests of

the membership, the school, or the community as a whole.

Agency fee arrangements also advance school districts' strong interest in fostering close working relationships among staff and between district leaders and their workforce. They reduce the risk that staff will be distracted by constant recruiting and disputes over joining a union or confronting management. They also help unions represent a broad base of employees, both by encouraging union membership and by facilitating robust communication with those members. Collaborative partnerships with unions provide a framework for getting the best feedback from principals, teachers, and support staff in a systematic, respectful, and honest way. These benefits, along with the stability brought by agency fee arrangements, promote collaborative relationships between front-line employees and school administrators—which have a well-recognized positive impact on educational outcomes.

School districts also adopt agency fee arrangements because they know that partnerships with stable unions are powerful vehicles for innovation. In districts with such arrangements, unions and employees have worked together effectively to improve public education—for example by investing in programs that excel at supporting and developing struggling teachers and other staff while removing those who fail to perform. The stability provided by agency fee arrangements fosters these creative collaborations, which are one of the most promising means of overcoming the challenges facing public schools.

Petitioners do not acknowledge these interests. Should they prevail, great harm will come from limiting

the ability of states and local school districts to seek these benefits through agency fee arrangements.

But that is not all. In reliance on this Court's decisions, amici and school districts across the country have entered into collective bargaining agreements that contain agency fee provisions. If petitioners prevail, thousands of school districts would face legal challenges, demands for renegotiation, and uncertainty. This disruption would introduce discord into public schools, interfere with long-term planning, and distract from schools' educational missions. This chaos would most negatively affect current students.

ARGUMENT

I. AGENCY FEE ARRANGEMENTS ADVANCE SCHOOLS' COMPELLING INTEREST IN WORKING WITH STABLE UNIONS TO ENHANCE PUBLIC EDUCATION

American public schools strive to provide the best possible education to their students in the face of extraordinary challenges. Their ability to innovate to meet these challenges is essential to achieving this common goal.

For that reason, this Court's recognition that government employers need "'wide discretion and control over the management of [their] personnel and internal affairs,'" *Connick* v. *Myers*, 461 U.S. 138, 151 (1983), holds special purchase in the domain of public education. As this Court has long acknowledged, "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Board of Educ. of Oklahoma City Pub. Schs.* v. *Dowell*, 498 U.S. 237, 248 (1991).

Consistent with this latitude, states and school districts across the country adopt agency fee statutes and arrangements. Petitioners disparage these arrangements and assert that public school districts' "only" interest is "in negotiating with a single exclusive representative," and that the "only conceivable link" between that interest and agency fees "is the possibility that, absent compelled subsidization, the union will go bankrupt." Pet. Br. 30, 49. This radically understates the scope of public school districts' constitutional interests.

To be sure, public school districts have an interest in dealing with a single union for each unit of employees, and agency fee arrangements prevent free riding that would undermine that interest. *Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 220-221 (1977). But that is not the end of the analysis.

States and public school districts that choose agency fee arrangements do so because they have compelling interests in working with stable unions that can effectively represent their members and serve as partners for long-term, collaborative innovation. Amici and hundreds of other school districts find that agency fee arrangements are an essential mechanism for advancing these interests.

A. Agency Fee Arrangements Allow Unions To Take A Long-Term Approach In Collective Bargaining

In negotiating collective-bargaining agreements, public school unions often face difficult choices between the short- and long-term goals of their members and other employees. And when budgets are tight, school districts may ask unions to sacrifice important short-term interests without any clear offsetting benefit oth-

er than preserving the ability to provide necessary educational services and ensuring longer term public support for public education. Agency fee arrangements make collective bargaining more effective by giving unions the stability to make difficult agreements that may be unpopular but are in the long-term interests of employees, students, and the entire community.

This interest ties directly to the free-rider problem. There is always a risk of free riding when a union is supplying a collective good that must be provided to all employees regardless of union membership. *E.g.*, Zax & Ichniowski, *Excludability and the Effects of Free Riders: Right-to-Work Laws and Local Public Sector Unionization*, 19 Pub. Fin. Rev. Q. 293, 309-310 (1991). But that risk is especially high when circumstances require short-term sacrifices by employees, such as layoffs, salary freezes, or salary cuts. Such controversial decisions make it more likely that individual members will refuse to pay their share of collective-bargaining costs.

Disallowing agency fee arrangements vastly increases the leverage of dissident factions over the *entire* bargaining unit's behavior—rather than organizing for the next election, these factions can now threaten an immediate loss of funds by discontinuing their membership. *Cf. Brooks* v. *NLRB*, 348 U.S. 96, 100 (1954) (a union's bargaining rights are insulated from a competing union's challenge for one year so that the union is not "under exigent pressure to produce hot-house results or be turned out").

Such membership instability discourages unions from agreeing to hard choices and instead creates an incentive to take hardline positions, press borderline grievances, and even demonize school leadership to

"'demonstrate that they can "get something" for their members.'" Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C.L. Rev. 993, 1012 (1976).

For example, the regime governing federal employee labor relations—which does not allow agency fees—has bred an adversarial and litigious environment in which unions have the incentive to "concentrate on the problems raised by 'malcontents.'" *See* GAO, *Federal Labor Relations: A Program in Need of Reform* 33 (July 1991). The same dynamic can be seen in states where agency fees are banned. *E.g.*, Marvit & Schriever, *Members-only Unions: Can They Help Revitalize Workplace Democracy?* 2, 3 (Oct. 1, 2015) (members-only unions—"located [predominately where] legal conditions ... such as right-to-work laws make it difficult to organize a majority union"—have adversarial relationships with employers, defining success as "retaining a significant membership and winning discrete battles in the workplace"); Kalita, *A Teachers Union Puts New Approach to Test in Fairfax*, Wash. Post, June 30, 2004, at B1 (describing rival teachers unions in Fairfax County, Virginia, and the "'confrontational,'" "militant" relationship with management).

In contrast, unions with agency fee arrangements can work with school districts to reach necessary but hard agreements—even in the face of vocal opposition within the bargaining unit.

Recent events in San Diego Unified School District (SDUSD) provide one example. In March 2012, to deal with the ongoing impact from the recession, the SDUSD School Board took a painful but unanimous vote to layoff 1,656 teachers. The move prompted an

outcry from some local school employees. *See* San Diego Education Association, *1,000+ March Against Education Cuts and Layoffs* (May 3, 2012). Local union leaders kept talking to the district, challenging its proposed budget while explaining the severity of the problem to school employees. The union leaders' efforts to cooperate faced bitter resistance from vocal dissenting factions. *E.g.*, Breakfast Club Action Group, *The SDEA Board Voted Last Night To Open Our Contract* (June 8, 2012) (accusing union leaders of "l[ying]" and "bargain[ing] away the hard-fought pay of thousands"); *see also* Steussy & Devine, *Teacher Contract Talks Continue Into the Night*, NBC San Diego (June 12, 2012) (discussing protest petition organized by Breakfast Club and signed by "about 700" union members). SDUSD and the union, however, had an agency fee arrangement in place.

Ultimately, the union agreed to various concessions, including furlough days and deferred raises, in exchange for reduced layoffs and other measures. San Diego Education Association, *An Important Letter from the SDEA Board of Directors* (June 19, 2012). Although the deal was ratified, one-third of union members voted to reject it. That fall, union leaders faced an unsuccessful recall petition charging that they had replaced "strong union organizing targeting the District" with "'collaboration.'" Breakfast Club Action Group, *SDEA Can Do Better* (Sept. 30, 2012).

As this example illustrates, under an agency fee arrangement, dissenting employees have the freedom to speak out. If they convince a majority of their peers, they can reject an agreement, replace leadership, or decertify the union. But they cannot threaten immediate withdrawal of financial support and hold hostage union decision-making when the need for quick and de-

cisive action on hard choices is paramount. That danger would be present even if a majority of the bargaining unit supports the union's position and even if the union's position is in the best interests of the school, the students, and the majority of employees.

Moreover, given time, agency fee arrangements create a foundation of stability that can lead to school districts and unions developing trusting relationships that can manage even the most difficult circumstances.

For example, in suburban Cleveland, Ohio, the Berea City School District faced an unprecedented budget shortfall during the recession. Ghizzoni, *Economic Turbulence in the Economy Impacts District*, Inspiring Excellence, Winter 2004, at 1. To stabilize the budget, the district—which has long had an agency fee arrangement with its teacher and administrator unions—was forced to close and consolidate schools and substantially reduce staff. *Id.*; *see also* Berea City School District, *Comprehensive Annual Financial Report For the Fiscal Year Ended June 30, 2013*, at S27-S28, S34 (Dec. 18, 2013). The teacher and administrator unions worked closely with management to determine how best to place staff into the consolidated buildings. Berger DuMound, *Berea School District's Consolidation Update* (Apr. 5, 2013). School district and union leaders attributed the successful negotiation to the parties' open, trusting relationship and cooperative, non-adversarial approach to bargaining. Berger DuMound, *Berea Teachers, Administrators Contracts See No Base Pay Increases* (Apr. 11, 2013).

Berea City's success would not have been possible without the security afforded to unions by agency fee arrangements. As one empirical study sponsored by the National Bureau of Economic Research has found,

districts in states allowing or requiring agency fee arrangements have lower teacher quit rates, higher quality teachers, and lower student dropout rates. Han, *The Myth of Unions' Overprotection of Bad Teachers: Evidence from the District-Teacher Matched Panel Data on Teacher Turnover* 35, 38, 41 (Harv. Law Sch. Labor & Worklife Program, Working Paper, Oct. 5, 2015). By contrast, in many states without agency fee regimes, unions have been unable to work together with school districts to promote school improvement and maintain teacher quality. Constant conflict contributes to vicious cycles of budget cuts, low employee morale, high staff turnover, and poor student performance. *E.g.*, Richmond, *Kansas's Teacher Exodus*, The Atlantic (July 15, 2015) (describing teacher shortages in Kansas, Nevada, Arizona, and Indiana, none of which allows agency fees).

B. Agency Fee Arrangements Advance School Districts' Interest In Close Working Relationships Among And With Staff

Agency fee arrangements also foster trusting, close relationships in the workplace, which this Court has repeatedly recognized is an important interest for a government employer. *Rankin* v. *McPherson*, 483 U.S. 378, 388 (1987) ("[P]ertinent considerations" for First Amendment balancing include "harmony among coworkers" and "close working relationships for which personal loyalty and confidence are necessary."); *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488, 2495-2496 (2011) (recognizing a "substantial government interest[]" in avoiding "a serious and detrimental effect on morale"); *Connick*, 461 U.S. at 151 ("'[I]t is important to the efficient and successful operation of [government] for [employees] to maintain close working rela-

tionships with their superiors.'"). Amici know from firsthand experience that close relationships and open channels of communication have significant, positive impacts on student education and learning.

1. Agency fee arrangements promote close relationships among staff in at least three ways.

First, agency fee arrangements reduce the risk of discord among employees because staff who elect not to join a union still bear their fair share of the costs—eliminating a potential source of resentment and controversy. Chaison & Dhavale, *The Choice Between Union Membership and Free-Rider Status*, 13 J. Lab. Res. 355, 360 (1992) ("[G]roups may devise special incentives to serve as a counterforce to the tendency to free ride."); *id.* at 361 ("[F]ree-rider status may carry significant social costs that can be reduced only by union membership."); *see also* Fehr & Gächter, *The Economics of Reciprocity*, 14 J. Econ. Perspectives 159, 163-164 (2000) (when "self-interested types" free ride on a public good, "reciprocal types" are motivated to inflict punishment).

Second, agency fee arrangements greatly reduce the disruption that would result from unions' otherwise constant efforts to organize and build membership, including through informal pressure and incessant workplace solicitation. As one education union explains to its members: "Without the ability to collect fair share fees from non-members, [a] union will have to continuously organize new members." American Association of University Professors Collective Bargaining Congress, *Organizing in Challenging Contexts*, *available at* http://www.aaupcbc.org/get-organized/forming-new-union-chapter/organizing-challenging-contexts (last visited Nov. 13, 2015). "[C]ontinuous[] organizing" can

mean continuous workplace discord and distraction—which school districts have a strong interest in avoiding.

Third, the stable relationships made possible by agency fee arrangements serve the human resources interests of the school district by providing structured processes for resolving workplace conflict and promoting problem solving. Disputes between employees and administrators that might otherwise have escalated or provoked controversy can be managed through well-functioning grievance processes jointly administered by the school and the union.

2. Agency fee arrangements also contribute significantly to promoting effective management-employee relations in two key ways.

First, agency fee arrangements increase the legitimacy of the union. In particular, by reducing the financial benefit of non-membership in the union, and thereby increasing membership, *see* Chaison & Dhavale, J. 13 Lab. Res. at 366,[2] agency fee arrangements provide a school district with greater assurance that the union represents all employees at the negotiating table and is faithfully carrying out its duty of fair representation. Broader membership also provides a collective voice in addressing challenges facing schools and their students.

Second, by increasing membership, agency fee arrangements facilitate more effective communications

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[2] For example, in the federal government, where agency fee arrangements are not permitted, only 27.5% of employees are union members. *See* BLS, *Economic News Release, Table 3, Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry* (Jan. 23, 2015).

with the workforce concerning relevant matters of mutual concern. Stable unions can invest in communicating with members and nonmembers alike through newsletters, meetings, employee-to-employee outreach, and other channels. *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 450, 451 (1984) ("The union must have a channel for communicating with the employees," and such means are "important to the union in carrying out its representational obligations."). More regular communication with employees gives unions a better understanding of their views, which in turn improves the quality of labor-management relations. School districts would have difficulty developing such strong communication channels on their own—being unable to replicate the trust that employees have in their elected representatives. Rubinstein, *Unions As Value-Adding Networks: Possibilities for the Future of U.S. Unionism*, 22 J. Lab. Res. 581, 585 (2001).

Those communication channels facilitate the transmission of school districts' interests to employees and vice versa. Talk of fiscal constraints might be dismissed as negotiating rhetoric when voiced by administrators. But, as in San Diego, when a trusted union advocates for its members' interests while conveying the gravity of management's concerns, union membership is demonstrably more receptive to taking management's views and perceptions into consideration. That facilitates collective resolution of problems that require cooperative attention.

3. These close working relationships have tremendous value. Studies consistently show that strong union-administration relationships improve educational

outcomes for students.[3] Indeed, the U.S. Department of Education has asserted its "working hypothesis" that "collaboration is a more effective and efficient way to develop great teachers and strong instructional systems, and that it is a more sustainable approach over time than the ups and downs of adversarial relationships." Department of Education, *Shared Responsibility: A U.S. Department of Education White Paper on Labor-Management Collaboration* 23 (May 2012). Agency fee arrangements make those partnerships much more likely to develop.

One example of this dynamic at work can be seen in the turnaround at Broad Acres Elementary School in Montgomery County, Maryland—where the school district and its unions have long shared an agency fee arrangement. Broad Acres, whose student body was the poorest in the district and included many recent immigrants, had been the lowest-performing elementary school in the district. *See generally* Simon, *Transformation at Broad Acres Elementary* (2007) ("*Broad Acres Case Study*"). Faced with Broad Acres' chronic underperformance, the superintendent of Montgomery County Public Schools determined that it might be necessary to "re-constitute" the school by removing the

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[3] *E.g.*, Rubinstein & McCarthy, *Teachers Unions and Management Partnerships: How Working Together Improves Student Achievement* 2 (Mar. 25, 2014) (among other findings, "[f]ormal partnerships help improve student performance" and "[p]artnerships lead to more extensive communication between teachers"); WestEd, *Labor-Management Collaboration in Education: The Process, the Impact, and the Prospects for Change* 1 (2013) ("A key finding ... is that collaborative partnerships often build trust and strengthen professional relationships among local leaders. The partnerships have been crucial for districts attempting to implement innovative practices that improve teaching and learning.").

principal and bringing in new staff—a disruptive and expensive process. *Broad Acres Case Study* 5. But after working with the district's three labor associations, which represent teachers, administrators, and support staff, the superintendent agreed to an alternative strategy: reinvesting in employees who signed on to a sweeping plan to improve the school. *Id.* at 6. Through their unions and in exchange for a pay increase and extended planning time, employees at Broad Acres agreed to receive more training, work more hours each week, work during the summer, and commit to stay at the school for at least three years—reducing chronically high teacher turnover. *Id.* at 6; *see also* Gowen, *Initiative Aims to Give Broad Acres New Direction; Low Test Scores Set Overhaul Into Motion*, Wash. Post, Aug. 30, 2001, at T16. Employees also agreed to play an active part in planning, analyzing, and leading efforts to improve student achievement. *Broad Acres Case Study* 6-7.

This ambitious plan would have been unthinkable without employee support, which required rebuilding trust after the threat of re-constitution. *Broad Acres Case Study* 8. The unions, as trusted advocates for the employees, engaged teachers at the school in designing the new turnaround plan. *Id.* at 8-9. A third of the teachers decided to leave the school and take preferential transfer status, but a full two-thirds decided to stay and commit to the turnaround plan. *Id.* at 9.

The collaborative plan worked. Administrators and employees developed innovative approaches tailored to the special challenges of the low-income, immigrant-heavy student body. *Broad Acres Case Study* 9. Within a few years, the collaborative effort raised testing proficiency rates by up to 50 percentage points. *Time to Celebrate Big, Broad Jumps In Test Scores*, Wash.

Post, June 3, 2004, at T6; *see also* Fisher, *A School That Works By Working Together*, Wash. Post, Jan. 8, 2009, at B1. Amici—which include the school district that negotiated these arrangements—firmly believe that agency fees helped create the conditions that enabled this turnaround.

C. Agency Fee Arrangements Promote Innovative Collaboration Between Schools And Unions

This Court has long recognized that local control over education "allows innovation so that school programs can fit local needs." *Dowell*, 498 U.S. at 248. This innovation advances state and local interests in a "teacher's proper performance of his daily duties in the classroom" and in the "regular operation of the schools generally." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 572-573 (1968). Agency fee arrangements further this interest in at least two ways.

1. For amici, school districts' ability to innovate and experiment to improve their performance turns in large measure on their ability to work collaboratively with their employees. In many districts, unions have worked with administrators to develop and carry out policies that fundamentally reimagine the role of unions, teachers, and other district personnel in school administration. In particular, unions and the employees they represent have taken on non-traditional roles—such as participating in teacher evaluations or discussions about using and preparing for standardized testing—that improve student experiences and outcomes. As discussed in sections I.A and I.B, agency fee arrangements set the conditions for such innovative collaboration, by promoting long-term planning, non-

adversarial mindsets, experimentation, and effective communication.

For example, a number of districts have implemented "Peer Assistance and Review" (PAR) programs. These programs, which are jointly administered by the local teachers and principals unions, evaluate and mentor new and struggling teachers. *See generally* Harvard Graduate School of Education, *A User's Guide to Peer Assistance and Review*, *available at* http://www.gse.harvard.edu/~ngt/par/resources/users_guide_to_par.pdf (last visited Nov. 13, 2015). They emerge from shared labor-management interests in improving the quality of instruction for students and creating an evaluation system that is less adversarial but effective in mentoring struggling teachers and transitioning those who persistently underperform.

In a typical PAR program, teams of "consulting teachers"—expert teachers chosen through a competitive process—are responsible for coaching and evaluating new and struggling teachers. *A User's Guide to Peer Assistance and Review* 5. During the course of a school year, these consulting teachers monitor their assigned teachers' performance; provide coaching, support, real-time feedback, and hands-on guidance; and ultimately present their recommendations to a panel of administrators and teachers about whether their teachers should be dismissed, re-hired, or provided another year of PAR support. *Id.* at 5-6; *see also* Montgomery County Public Schools, *Teacher-Level Professional Growth System Handbook* 9-17 (2015); Hess, *The Cage-Busting Teacher* 152-153 (2015).

PAR programs have many positive effects. They have helped contribute to "significant increases in student achievement and a substantial narrowing of the

achievement gap." Marietta, *The Unions in Montgomery County Public Schools* 1 (2011); *see also*, Malin, *Education Reform and Labor-Management Cooperation*, 45 U. Tol. L. Rev. 527, 531 (2014) (peer review helps explain the academic success of Toledo City District, which has typical urban demographics "but sustains top scores on state performance indices for grades 3-6, has the highest graduation rate and second highest attendance rate among large urban districts in Ohio, and boasts [a high school] ranked in the top 10% of high schools by *U.S. News & World Report*"). PAR programs also save money by reducing turnover and the costs of dismissing teachers. *See A User's Guide to Peer Assistance and Review* 11 (replacing novice teacher costs $10,000 to $20,000); Ferlazzo, *Creating a Culture of Improvement With Peer Assistance & Review (PAR)*, Educ. Week, Feb. 1, 2013 (five-year retention rate of 65% in PAR-adopting Montgomery County, compared to 50% nationally).

Moreover, PAR programs address multiple concerns of labor and management. They ensure that underperforming teachers get the support they need. They alleviate the burden on principals to singlehandedly administer evaluation programs and instructional support to struggling teachers. And they also allow schools to identify effective teachers and dismiss ineffective teachers more efficiently without a prolonged adversarial process.[4]

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[4] Montgomery County has further adapted the PAR model for support staff, establishing a "Supporting Services Professional Growth System" for evaluating, developing, and recognizing employees, replacing the ordinary arbitration process. *Agreement Between SEIU Local 500, CTW and Board of Education of Montgomery County for the School Years 2015-2017* art. 29 (Mar. 11, 2014). Although the program substantially raises performance

Because school employees recognize that PAR programs are joint labor-management enterprises, they are more likely to readily support these changes and actively participate in the programs. Agency fee arrangements support the cooperative, stable relationships necessary to establish a PAR program, and help obtain the enthusiastic employee buy-in critical to those programs' success. Indeed, successful PAR programs are predominately located in school districts that have adopted agency fee arrangements. *See, e.g.*, Johnson, et al., *Teacher to Teacher: Realizing the Potential of Peer Assistance and Review* 25 (May 2010); American Federation of Teachers and National Education Association, *Peer Assistance & Peer Review* A3, B1-B9 (1998); Sawchuk, *Judging Their Peers*, Educ. Week, Nov. 18, 2009, at 20, 22.

2. Agency fee arrangements have also allowed unions to take on roles outside of traditional collective bargaining; they support (financially and otherwise) a wide range of services beneficial to employees and schools as a whole, including professional development, mentoring, and benefits counseling. *E.g.*, Kaboolian, *Win-Win Labor-Management Collaboration in Education: Breakthrough Practices to Benefit Students, Teachers, and Administrators* 55-56 (2005) (Minneapolis teachers union helped develop and fund professional development program).

These services can fill crucial gaps created by budget constraints. *E.g.*, Kaboolian 57 (Pittsburgh teachers union provided funds and expanded professional development program when school district "sig-

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expectations for participating employees, the robust professional development and support system helps employees meet those high standards, to the mutual benefit of staff and the school district.

nificantly reduced its financial support"). They can also bring national resources and attention to local school districts and teachers pursuing innovative and ambitious programs. *E.g.*, National Education Association Foundation, *Grants to Educators*, *available at* http://www.neafoundation.org/pages/grants-to-educators/ (last visited Nov. 13, 2015) ("[O]ver the last 10 years, we have awarded more than $7.1 million to fund nearly 4,500 grants to public school educators to enhance teaching and learning."); American Federation of Teachers, *AFT Innovation Fund*, *available at* http://www.aft.org/about/innovation-fund (last visited Nov. 13, 2015) ("The AFT Innovation Fund will invest approximately $500,000 to support four local AFT affiliates' work with their local partners to expand career and technical education opportunities.").

For example, Connecticut's Meriden Public Schools worked with its teachers union, which is supported by an agency fee arrangement, to apply for an AFT Innovation Fund grant to fund extended-hour school days at two high-poverty elementary schools over a three-year period. American Federation of Teachers, *It's About Time: Lessons from Expanded Learning Time in Meriden, Conn.* 1-2 (2014); *see also* Dubin, *Moving Meriden*, Am. Educator, Winter 2013-2014, at 29, 30. The collaborative district-union relationship helped obtain the support of employees for the new, longer schedules and adapt quickly to challenges in implementation. *It's About Time* 2-6, 23-24. The schools saw strong improvements in test scores, attendance, and satisfaction—prompting the program to expand to other schools, including in two other Connecticut districts. *Id.* at 3.

Another example is California's ABC Unified School District, where the local union helped create the

"South Side Schools Reading Collaborative" to address poor performance in the South Side Schools, which had "a majority of students who were English Language Learners and had low proficiency in reading and math." Rubinstein & McCarthy, *Collaborating On School Reform: Creating Union-Management Partnerships* 9 (Oct. 2010). To make the program work, "the union even increased its membership dues to pay for substitute teachers so South Side faculty could be released to take ... professional development training." *Id.* The union also funded "peer coaching, full-day reading conferences, and community partnerships" through the program. Eckert, et al., *Local Labor Management Relationships as a Vehicle to Advance Reform* 10 (2011). As a result, the South Side Schools "have posted the greatest student achievement growth in the district." *Id.* This program would not have been possible without an agency fee arrangement, which allowed the union to raise membership dues without risking membership cancellations and increased free riding.

Without membership stability, these mutually beneficial programs and services are likely to be among the first to be cut as unions focus on immediate, short-term bread-and-butter issues to appeal to the lowest common denominator. If unions stop providing these programs and services, they would either cease to be provided or school districts would be forced to fund them directly, diverting scarce resources from school budgets. *See, e.g.*, Kaboolian 57.

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Agency fee arrangements are a critical component of contemporary public-education management. School districts and unions have learned that providing high-quality educational services to students often entails

significant commitment from unions and their members, which are made possible by the fidelity, flexibility, and resources that agency fee arrangements allow. Unions that can take the long view recognize that providing effective educational services is essential to preserving public support for public education, and to protecting the long-term interests of their members.

States and school districts are best positioned to determine how to structure their employment relations to best serve the interests of their students. The choice to adopt an agency fee arrangement is assuredly one that states and public school districts can reasonably—and lawfully—make.

II. Overturning *Abood* Would Gravely Upset Public School Labor Relations And Cause Ongoing Disruption Affecting Students

In the years since *Abood*, amici and other public school districts across the country have entered into multi-year contracts containing agency fee provisions. School districts have a strong interest in avoiding the legal challenges, demands for renegotiation, and uncertainty that would inevitably result from overturning *Abood*. *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("[O]verruling the decision would dislodge settled rights and expectations or require an extensive legislative response."). In school districts with multiple union agreements—where, for example, separate contracts govern teachers, service employees, and administrators—the problems would be multiplied.

This is not a speculative concern. After Michigan prohibited public sector agency fees, 2012 Mich. Pub. Acts 349, collective bargaining relationships were thrown into disarray. Unions immediately brought le-

gal challenges, and the governor requested an advisory opinion from the Michigan Supreme Court. *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348 & 2012 PA 349*, 829 N.W.2d 872, 874 (Mich. 2013). When the court declined that request, lawsuits proliferated and have continued to work their way through the Michigan courts, with inconsistent results. *E.g.*, *UAW* v. *Green*, 2015 WL 4562462, at *7 (Mich. July 29, 2015) (Michigan civil service commission "may not require collection of agency shop fees to fund its administrative operations"); *Steffke* v. *Taylor Fed'n of Teachers AFT Local 1085*, 2015 WL 1592654, at *4 (Mich. Ct. App. Apr. 7, 2015) (teachers had standing to pursue declaratory-judgment claim on validity of union security agreement requiring payment of union dues or a service fee); *see also Michigan State AFL-CIO* v. *Callaghan*, 15 F. Supp. 3d 712, 722 (E.D. Mich. 2014) (denying motion to dismiss in case alleging that act prohibiting private sector agency fees, Public Act 348, was preempted by federal law).

School districts and unions would not quickly settle into a new status quo. State legislatures may decide to overhaul public sector labor-relations law to adjust to new limitations. Future negotiations would be more complicated and contentious, as unions seek to renegotiate long-settled terms in light of the new economic reality.[5] The costs of this disruption would be borne

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[5] Unions will face immediate revenue losses not only from the loss of non-member agency fees, but also as current members take advantage of their new-found ability to free ride. On an ongoing basis, unions will also find it more difficult to recruit new members. Moreover, unions would face legal uncertainty about their past revenues. *See, e.g.*, *Schlaud* v. *Snyder*, 785 F.3d 1119 (6th Cir. 2015) (putative class action concerning union liability for back fees under *Harris* v. *Quinn*, 134 S. Ct. 2618 (2014)).

most heavily by current students—who need administrators and employees focused on the classroom during their limited years in school. Furthermore, there is a risk that the effort school districts have expended to develop collaborative relationships with their unions would be wasted, as unions deprived of agency fees refocus on continuous organizing and demonstrating quick wins for employees.

This ongoing disruption will also make long-term planning difficult, especially in areas where union cooperation is critical. Some of the more innovative programs adopted by school districts and unions—such as the PAR program discussed above—are especially likely to be derailed. States and school districts have spent decades learning how to work with their unions to advance efficient and effective public administration—the Court should not now upset the progress that has been made.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

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NOVEMBER 2015